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6 SERVICE EMPLOYEES INTERNATIONAL
7 UNION LOCAL 87

8 **UNITED STATES OF AMERICA**

9 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**

11 EXEMPLAR,)	Case No. 20-rc-149999
12)	
13 Employer,)	SERVICE EMPLOYEES
14 vs.)	INTERNATIONAL UNION LOCAL
15 SERVICE EMPLOYEES)	87's BRIEF ON REVIEW OF
16 INTERNATIONAL UNION LOCAL 87,)	REGIONAL DIRECTORS' DECISION
17)	AND DIRECTION FO ELECTION
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18 **INTRODUCTION**

19 Service Employees International Union, Local 87 (SEIU Local 87) has sought a
20 review of the Regional Director's decision and direction of election. SEIU Local 87
21 requested a bargaining unit consisting of all Exemplar employees employed in janitorial
22 services within the city of San Francisco. The Regional Director concluded that the
23 multi-facility bargaining unit requested by SEIU Local 87 was not appropriate despite
24 almost all of the factors used in such a determination supporting SEIU Local 87's
25 requested multi-facility unit. The Director ruled that the requested unit was
26 inappropriate because at the company's sole discretion, and without any need, there was
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1 no interchange of employees between the two buildings that Exemplar janitors cleaned.
2 The Regional Director has misapplied the National Labor Relations Board precedents
3 and presumptions and provided precedent that would allow the employer to easily be
4 the sole arbiter of a bargaining unit determination.
5

6 The petitioner is asking National Labor Relations Board to certify a bargaining
7 unit consisting of all workers employed by Exemplar in janitorial services, whether full
8 or part time, within the city of San Francisco.

9 **FACTS**

10 SEIU Local 87 is a labor union that represents janitorial employees within the
11 city of San Francisco. Exemplar is a company that owned and operated by Marth Lutt.
12 Exemplar provides janitorial services to office buildings in several locations throughout
13 the United States. Exemplar provides janitorial services at three locations in San
14 Francisco, 630 Sansome, 555 Battery and 50 U.N. Plaza. 630 Sansome and 555 battery
15 are essentially one location and are treated as such.
16

17 630 Sansome has roughly ten employees and 50 U.N. Plaza has six employees. At
18 both locations the employees do janitorial work consisting of cleaning the offices, floors
19 and bathrooms at the respective buildings. For each building Exemplar has a separate
20 contract to provide janitorial services with the United States government.
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22 The working conditions, wages and benefits at both locations are basically the
23 same. Ms. Lutt testified that when wages and benefits are calculated together for the
24 employees at both 630 Sansome and 50 U.N. Plaza they are equally paid. Sick days and
25 vacation days paid to the employees at both locations are the same and both location ns
26 are governed by the same employee handbook.
27

28 Both 630 Sansome and 50 U.N. Plaza are governed by the exact same company

1 organizational structure. Both locations are overseen by owner operator Marth Lutt and
2 both locations are supervised by the regional director Colleen Trundy. Ms. Lutt testified
3 that she makes the “policy decisions for both locations with respect to labor policy,
4 vacation policy pay policy” and everything else. Additionally Lutt and Trundy are
5 responsible for all hiring and firing decisions and disciplinary actions at both locations.
6

7 Additionally the 630 Sansome location requires the employees to go through a
8 higher level of security clearance before they can work in the building. However this
9 clearance is minimal and consists of a credit check and criminal background
10 investigation. Employees of Exemplar already have to pass a criminal background check
11 in order to be hired.
12

13 Exemplar has temporary fill in employees who can cover shifts at 630 Sansome
14 and an additionally employee who can cover shifts at 50 U.N. Plaza. Exemplar argues
15 that there is no interchange of employees between 630 Sansome and 50 U.N. Plaza and
16 that they keep the temporary fill in employees separate between the two buildings.
17 However Exemplar admits that there is no real reason for this as Ms. Lutt was unable to
18 articulate a reason under cross examination other than to claim that the situation has
19 not come up.
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21 Exemplar claims that there are extensive differences in the cleaning process used
22 at the two buildings. 50 U.N. Plaza relies on cleaning done exclusively during the day,
23 while 630 Sansome only some of the cleaning is done during the day. Exemplar claims
24 that 50 U.N. Plaza is different because it is a LEED certified building and has special
25 requirements, but Lutt admitted that Exemplar’s employees do not have to get LEED
26 certification and that any training is minimal. Additionally, Exemplar claims that because
27 50 U.N. Plaza has a historical floor it requires different employees. But under cross
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1 examination Ms. Trundy admitted that the training provided for servicing the historical
2 floor is minimal roughly two hours. Additionally SEIU Local 87 members constantly
3 service other historical floors throughout the city and have the requisite knowledge and
4 experience in handling historical floors. Exemplar claims that the two locations use
5 different cleaning chemicals and this is a significant difference. However Ms. Trundy
6 admitted that the training on the different chemicals would take about ten minutes (P.
7 85). Trundy admitted that it would only take a half a day at most to train an employee to
8 work at 50 U.N. Plaza despite all the alleged differences in work and equipment.
9

10 Exemplar claims that at the 630 Sansome location they have adopted the SEIU
11 Local 87 master contract and treat their employees according to the terms of the
12 contract. This is not correct. Exemplar is not a signatory to the SEIU Local 87 master
13 contract and despite their claims they have failed to apply the terms of the contract to
14 their employees. Exemplar only allows their employees at 630 Sansome to work seven
15 hours a day, despite the SEIU Local 87 contract requiring a daily shift of Seven and one
16 half hours. SEIU Local 87 does not negotiate contracts with an employer on a building
17 by building basis.
18

19 The Regional Director concluded that the two locations sought to be included in
20 the bargaining unit were geographically close, under the same direct management and
21 supervision, the employees at the two locations had the same exact job duties as
22 janitors, and that the employees at both locations received equivalent pay and benefits.
23 However, the Regional Director denied SEIU Local 87's requested multi-facility
24 bargaining unit because Exemplar has made sure there is no interchange between the
25 employees of the two facilities and because the union has not shown that the six
26 employees of 50 U.N. Plaza have asked to join the union. On that logic the Regional
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Director certified the 630 Sansome building as the bargaining unit.

ARGUMENT

a. The Factors Used to Determine if a Requested Multi-Facility Unit Is Appropriate Favor Granting SEIU Local 87's Requested Multi-Facility Unit

In determining if a requested multi-facility bargaining unit is appropriate the NLRB looks at the community of interests among the employees. The Board, in evaluating the community of interests among employees working at more than one location, considers several factors, including (1) similarity in employee skills, duties, and working conditions, (2) functional integration of the business, including employee interchange, (3) centralized control of management and supervision, (4) geographical separation of facilities, (5) collective bargaining history and extent of union organization, and (6) employee choice. *See Spring City Knitting Co.*, 647 F.2d at 1014; *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir.1978); *NLRB v. Sunset House*, 415 F.2d 545, 548 (9th Cir.1969).

“Because unit determinations are dependent on slight variations of facts, the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions.” *NLRB v. J.C. Penney Co., Inc.*, 620 F.2d 718, 719 (9th Cir.1980); *see also Pacific Southwest Airlines*, 587 F.2d at 1038. Each decision ultimately rests on the particular circumstances of that unique case when looking at the “community of interest” factors.

The only factors that do not weigh in SEIU Local 87's favor are the lack of employee interchange and employee choice.

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1 **b. The Legal Presumptions Established By the NLRB Favor**
2 **the Establishment of the Requested Multi-Facility**
3 **Bargaining Unit.**

4 Originally the NLRB had a presumption favoring the creation of bargaining units
5 that included the employer's entire operation. However, as this presumption was used
6 by employers to make organizing employees more difficult, the NLRB adopted a
7 presumption that a single facility was an appropriate unit that must be rebutted by the
8 employer. This can also be used to make organizing employees unnecessarily difficult as
9 an employer can force the union to organize location by location. Thus the NLRB
10 adopted another presumption.
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12 The NLRB has a rebuttable presumption in favor of single facility bargaining
13 units. However, that presumption does not apply where the union is the party seeking
14 the multi-facility bargaining unit and the employer is requesting a single facility unit.
15 *NLRB v. Carson Cable TV*, 795 F.2d 879, 886 (9th Cir. 1986).
16

17 **c. Employee Interchange Should not be the Determining**
18 **Factor in Light of the Legal Presumptions.**

19 In light of the above presumptions which favor the creation of a multi-facility unit
20 when requested by the union, the degree of interchange of employees between the
21 facilities should not be the determining factor as that is something entirely within the
22 control of the company and can be easily manipulated by the employer to create smaller
23 bargaining units that must be organized and negotiated for separately.

24 The facts in the present case illustrate how a company can manipulate this factor
25 in order to make organization of employees and bargaining more difficult for a labor
26 union. Despite having employees on an on-call list who are without a set position and
27 are waiting to replace temporarily absent employees, Exemplar refuses to use those
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1 employees to clean 50 U.N. Plaza. Exemplar has gone so far as to have their managers
2 fill in for shifts and do janitorial work at 50 U.N. Plaza rather than call in one of these
3 temporary employees. Exemplar could offer no reason for doing this. It is clear that the
4 only reason for such actions is to make sure that there is no employee interchange
5 whatsoever, to force SEIU Local 87 to organize and negotiate building by building.
6

7 The Regional Director determined that the lack of employee interchange was the
8 determining factor in the decision to deny the multi-facility bargaining unit. The
9 Director noted that even though there were no reasons why employees could not be
10 interchanged between the locations, and the facts indicate the actual need to
11 interchange employees, there can be no community of interest unless employees are
12 actually interchanged. For this proposition the Director cited *Exsex Wire Corp.* 130
13 NLRB 450. However, the citation to this case is misplaced. That case involved the
14 extension of a current collective bargaining agreement to a new location and not just a
15 bargaining unit determination. Additionally, the facts of the case indicate that, unlike
16 the present case, the two facilities were under separate supervision. *Exsex Wire* does not
17 stand for the proposition that lack of employee interchange alone is the determining
18 factor.
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21 This argument is further undercut by the Director's citation to *Jerry's Chevrolet*,
22 *Cadillac Inc.*, 344 NLRB 689. The Regional Director cites this case for the position that
23 "lack of significant employee interchange between groups of employees is a strong
24 indicator that employees enjoy a separate community of interest." However, he cites the
25 dissenting opinion for this proposition. The majority opinion holds that the employer
26 rebutted the single facility presumption despite the lack of employee interchange
27 between multiple car dealerships that was necessitated by the maintenance employees'
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1 separate skills working on different types of cars.

2 The Director attempts to get around this decision by claiming that in the present
3 case the facilities lack the geographic closeness and functional integration that was
4 important to the majorities' decision. However, the Director neglects the fact that in the
5 present case the same individuals have direct supervisory control and responsibility for
6 labor relations at both facilities.
7

8 The Ninth Circuit in *NLRB v. Carson cable TV* stated that in contrast to what the
9 Director has established here, "the most reliable indicium of common interests among
10 employees is similarity in their skills, duties and working conditions. 795 F.2d 879. 885
11 (9th Cir. 1986) (citing *Pacific Southwest Airlines*, 587 F.2d 1042). "The primary
12 concern or "touchstone" of a bargaining unit determination is the question of whether
13 all the members have a mutual interest in wages, hours, and other terms and conditions
14 of employment. [citation] This key factor assumes special prominence in
15 any bargaining unit determination....In particular, centralized control of day-to-day
16 labor relations in areas of importance to employees may indicate an integrated
17 operation where a broader unit may be appropriate." *N.L.R.B. v. Catherine McAuley*
18 *Health Center* (6th Cir. 1989) 885 F.2d 341, 345. The employer's organizational
19 structure is given considerable weight in determining an appropriate bargaining unit.
20 *Central Greyhound Lines*, 88 NLRB 13.
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24 **d. The Factor of Employee Choice Is Not the Determining**
25 **Factor**

26 The Director indicates that because the hearing record does not indicate whether
27 the employees at 50 U.N. Plaza wish to join the union, the multi-facility bargaining unit
28 should be denied. The Director states in a footnote that "on this basis alone, it would

1 appear that the board policy forecloses me from directing an election among the UN
2 Plaza employees.” For this propositions the Director cites *Speery Gyroscope Co.* 147
3 NLRB 988; *Brooklyn Union gas Company* 123 NLRB 441; *the Hartford Electric Light*
4 *Co.* 122 NLRB 1421 and *Great Lakes Pipe Line Co.* 92 NLRB 583. However, these cases
5 do not stand for the proposition for which they are cited. Additionally that notion is
6 rejected by the cases cited in the body of the decision which make clear that the extent
7 employees have been organized is a factor but not a controlling one. *Audiovox*
8 *Communications Corp.* 323 NLRB 647; *Pacific Southwest Airlines*, 587 F.2d 1032.
9

10 Additionally, the Director has flipped the rebuttable presumption on its head
11 whit this logic. A union requested multi-facility unit is presumed valid unless rebutted
12 by the employer. By elevating the importance of this factor the Director has forced SEIU
13 Local 87 to make the showing that the requested unit is appropriate. The employer
14 provided no evidence that the employees were opposed to the union and no employees
15 testified. If this factor is determinative then there is no presumption at all.
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17

18 **e. The Director has Misapplied the Precedent and Made a**
19 **Ruling That Will Have Far-Reaching Negative**
20 **Consequences**

21 The Director’s logic that the employer-created lack of employee interchange and
22 the lack of a record on employee choice should outweigh the other clearly established
23 factors is disturbing and should not be allowed by the NLRB to stand.

24 The Director has taken the two factors of employee choice and interchange and
25 made those the determining factors in a bargaining unit determination while ignoring
26 the factors that favor the union’s requested bargaining unit. Such a decision is not
27 appropriate.
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Employee interchange should not be considered the determining factor in the

1 union's request for a multi-facility bargaining unit as it is a factor directly in the control
2 of the employer and can be used to manipulate the bargaining unit determination. As in
3 this case where the employer's function—cleaning office buildings—necessitates that it
4 work with small numbers of employees at different buildings, the chance for abuse is too
5 great. All an employer has to do under the logic of the Director's decision is refuse to
6 interchange employees despite a need to do so, and the union would be forced to
7 negotiate contracts with the same employer on a building-by-building basis. Contracts
8 that may cover as few as the four employees who work at 50 U.N. Plaza.

10 Additionally, forcing the union to prove that the employees in each separate
11 building want to join the union defies the NLRB precedent and the established
12 presumption that such a unit is appropriate and forces the union to make the required
13 showing.

15 **f. The decision of the Regional Director undermines the**
16 **purpose of the National Labor Relations Act and**
17 **dramatically increases the chance of labor strife**

18 In authorizing the National Labor Relations Act Congress intended to use the act
19 to limit labor strife, strikes, picketing , and its disruption of commerce. 29 U.S.C. § 151.
20 The Regional Directors decision, if allowed to stand, would have the exact opposite
21 effect. As explained above, the Regional Directors decision would mean that each
22 building cleaned by exemplar employees, some as small as four employees, would have
23 to be organized separately and have their own contract. Such an amalgamation of
24 organizing drives and patchwork of contracts would lead to endless organizational
25 drives and contract negotiations throughout the office buildings in San Francisco. Such
26 a system would most likely lead to difficult negotiations for specific groups of
27 employees, picketing and strikes.
28

1 **CONCLUSION**

2 For the above stated reasons, SEIU Local 87 asks the NLRB to overturn the
3 decision of the Regional Director and certify a multi-facility bargaining unit that
4 includes all employees of Exemplar engaged in janitorial work within the City and
5 County of San Francisco.
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8 Dated: June 22, 2015

9 SIEGEL & YEE

10
11 By: /s/ Kevin Brunner
12 Kevin Brunner

13 Attorney for Petitioner
14 SERVICE EMPLOYEES INTERNATIONAL
15 UNION LOCAL 87
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I am employed in the county of Alameda, state of California. I am over the age of 18 years and not a party to the within action. My business address is 499 14th Street, Oakland, California

1. SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 87's BRIEF ON REVIEW OF REGIONAL DIRECTORS' DECISION AND DIRECTION FO ELECTION

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